

NOT TO BE PUBLISHED

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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

G & G FIRE SPRINKLERS, INC.,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO,

Defendant and Respondent.

E030209

(Super.Ct.No. SCV55828)

OPINION

G & G FIRE SPRINKLERS, INC.,

Plaintiff and Appellant,

v.

McCARTHY/OBAYASHI,

Defendant and Respondent.

(Super.Ct.No. SCV60723)

DIVISION OF LABOR STANDARDS
ENFORCEMENT

Plaintiff,

v.

McCARTHY/OBAYASHI et al.,

Defendants.

(Super.Ct.No. SCV55511)

APPEAL from the Superior Court of San Bernardino County. Christopher J. Warner, Judge. Affirmed.

Law Office of Robert G. Klein and Robert G. Klein for Plaintiff and Appellant.

Thomas R. Fredericks for Defendant and Respondent County of San Bernardino.

Castle & Lax, Paul A. Lax, and Judith L. Baxter for Defendant and Respondent McCarthy/Obayashi.

This is an action to determine entitlement to construction funds held by the County of San Bernardino (the County). On cross-motions for summary judgment, the court ruled the funds should go to respondent McCarthy/Obayashi. G & G Fire Sprinklers, Inc. (G & G) appeals that ruling and also purports to appeal from a ruling that McCarthy/Obayashi's agreement to pay the funds to the Division of Labor Standards Enforcement (the DLSE) was a good faith settlement. We affirm the summary judgment and dismiss the purported appeal from the good faith settlement determination.

I

FACTUAL AND PROCEDURAL BACKGROUND

In December 1994, the County hired McCarthy/Obayashi, a joint venture, as its prime contractor for a hospital construction project. McCarthy/Obayashi subcontracted with G & G for the construction of a fire sprinkler system. G & G did not complete the work, and McCarthy/Obayashi declared a default in August 1996.

The DLSE determined that G & G had improperly classified some of its workers and therefore had not paid them the prevailing wage required by the Labor Code. (See Lab

Code, § 1770 et seq.) In October 1996 and February 1997, the DLSE served notices on the County to withhold \$271,499 to cover the underpayments and penalties. The County withheld the funds from McCarthy/Obayashi.

In March 1997, the Sprinkler Fitters U.A. Local 709 (the Union) brought the present action in San Bernardino County Superior Court (the SBSC action) against the County, G & G, and McCarthy/Obayashi, to recover the unpaid prevailing wages. While the SBSC action was pending, in May 1997, G & G sued McCarthy/Obayashi in Los Angeles County Superior Court (the LASC action) for breach of the subcontract. In June 1997, McCarthy/Obayashi cross-complained against G & G in the LASC action, also for breach of the subcontract.

The LASC action was tried to a jury, which found G & G had breached the subcontract, and McCarthy/Obayashi had not breached it. McCarthy/Obayashi recovered a judgment for \$1,367,821, which was paid in full. According to McCarthy/Obayashi, G & G's appeal from the judgment was pending when this case was briefed.

The Union dismissed its SBSC action when the DLSE brought its own action in San Bernardino County Superior Court against McCarthy/Obayashi for the \$271,499. McCarthy/Obayashi then sued the County in San Bernardino County Superior Court to recover the withheld funds. G & G, in turn, separately sued McCarthy/Obayashi and the

County in San Bernardino County Superior Court, also seeking the withheld funds.¹ All of the San Bernardino County actions were consolidated.²

McCarthy/Obayashi settled with the DLSE by agreeing to pay the \$271,499 to the DLSE on receipt of the funds from the County. On McCarthy/Obayashi's motion, the court ruled the agreement was a good faith settlement, and barred G & G from suing McCarthy/Obayashi for the \$271,499 pursuant to Code of Civil Procedure section 877.6. The court also granted the County's motion to be dismissed from the case upon depositing the funds with the clerk.

G & G and McCarthy/Obayashi made cross-motions for summary judgment, each claiming the right to the \$271,499. The court granted McCarthy/Obayashi's motion, ruling that McCarthy/Obayashi had not already recovered the \$271,499 in the LASC action and therefore did not "pass through" the withholding to G & G by not paying G & G the disputed funds.

¹ The record does not contain copies of G & G's complaints against McCarthy/Obayashi and the County. According to G & G, it claimed that, if McCarthy/Obayashi prevailed in its action against the DLSE, G & G and not McCarthy/Obayashi should receive the funds.

² For purposes of clarity, the case title on appeal reflects the two lower court cases filed by G & G, which are the subject of this appeal. It also reflects the lower court case filed by the DLSE, in which the disputed good faith settlement was made. There were actually five lower court cases consolidated below. The two not reflected in this court's title are Sprinkler Fitters U.A. Local 709 v. County of San Bernardino (No. SCV 37158, lead case) and McCarthy/Obayashi Joint Venture v. County of San Bernardino (No. SCV55623).

II

DISCUSSION

G & G's appeal primarily challenges the court's grant of summary judgment awarding the disputed funds to McCarthy/Obayashi. Before turning to that question, however, we first consider two jurisdictional issues: (1) whether G & G's appeal is timely as to the County, and (2) whether G & G can challenge the court's determination that McCarthy/Obayashi's settlement with the DLSE was a good faith settlement.

A. Timeliness of Appeal as to the County

As stated, the County successfully moved for an order discharging it from liability as a stakeholder and for dismissal. In effect, the County sought to interplead the disputed funds, in which it claimed no interest itself. The court's order granting the County's motion was filed March 2, 2001.

Later, on August 2, 2001, the court granted McCarthy/Obayashi's motion for summary judgment and entered a judgment to that effect. The judgment also stated that G & G's causes of action against the County "are hereby dismissed"

G & G appealed from the August 2 judgment on September 7, 2001. G & G did not separately appeal from the March 2 order granting the County's motion to be discharged from liability. The County contends a final judgment in its favor was entered when the court issued its March 2 order. Therefore, the County contends, G & G's September 7 appeal was untimely as to the County under rule 2(a) of the California Rules of Court and must be dismissed.

We note that whether the appeal is timely as to the County will not affect the outcome, as G & G has made no separate claim of error based on the dismissal of the County. However, since the County's contention challenges our fundamental jurisdiction, we will consider the issue despite its lack of effect on the outcome.

Where a case involves multiple parties, a judgment which leaves no issue to be determined as to one party is immediately appealable even though issues remain as to other parties. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, disapproved on another point in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171.) If a judgment is immediately appealable and a party fails to appeal it within the prescribed time, this court is without jurisdiction to review the judgment on a subsequent appeal. (Code Civ. Proc., § 906; *In re Marriage of Lloyd* (1997) 55 Cal.App.4th 216, 219.) Therefore, if the March 2, 2001, order was a final judgment as to the County, G & G lost the right to challenge that judgment by failing to file a timely appeal from it.

It is not clear whether the court intended its March 2 order to be a final judgment or intended instead to enter a separate final judgment after the County deposited the disputed funds. The order stated that the County was to deposit the funds with the clerk; that "[u]pon making such deposit," the County would be discharged from any further liability to any party with respect to the funds deposited; and that a judgment of dismissal "thereupon is entered" in favor of the County in G & G's action against the County. As far as the record indicates, the court never entered a separate judgment based on the March 2 order.

If a judgment is ambiguous, we may examine the entire record to determine its scope and effect. (*Southern Pacific Pipe Lines, Inc. v. State Bd. of Equalization* (1993) 14 Cal.App.4th 42, 49.) Here, the court's August 2 judgment granting McCarthy/Obayashi's motion for summary judgment also stated that G & G's causes of action against the County were dismissed. That fact suggests the court did not view its March 2 order as a final judgment in favor of the County. Otherwise, there would have been no reason to order in the August 2 judgment that G & G's claims against the County were dismissed.

In view of the ambiguity, we will give G & G the benefit of the doubt and interpret the August 2 judgment as the final judgment in favor of the County. Under that interpretation, G & G's appeal was timely as to the County. We therefore deny the County's request to dismiss the appeal.

B. *Review of Good faith Settlement Determination*

G & G's September 7, 2001, notice of appeal also purported to appeal from the granting of McCarthy/Obayashi's motion for a good faith settlement determination. On the motion of McCarthy/Obayashi, we have ordered the record augmented to include the order granting the good faith settlement motion and the notice of ruling on the motion. Those documents show that the motion was granted on October 30, 2000, and notice was served on G & G on December 11, 2000.

Code of Civil Procedure section 877.6, subdivision (e) provides: "When a determination of the good faith or lack of good faith of a settlement is made, any party aggrieved by the determination may petition the proper court to review the determination by

writ of mandate. The petition for writ of mandate shall be filed within 20 days after service of written notice of the determination, or within any additional time not exceeding 20 days as the trial court may allow.”

This court recently held that “[a] determination that a settlement has been made in good faith is a nonappealable interlocutory decree. [Citations.] ‘Mandamus is the exclusive procedure for obtaining immediate review’ of such an order. [Citations.]” (*Main Fiber Products, Inc. v. Morgan & Franz Ins. Agency* (1999) 73 Cal.App.4th 1130, 1134.) Therefore, “an aggrieved party may not forgo writ review and seek instead to have the determination reviewed for the first time in an appeal from the final judgment arising out of the trial of the plaintiff’s claims against the nonsettling defendants.” (*Id.*, at pp. 1136-1137, fn. omitted.)

The record does not reflect that G & G filed a timely writ petition seeking review of the determination that the settlement between McCarthy/Obayashi and the DLSE was in good faith. Moreover, since G & G’s appeal was filed more than 20 days after the order determining the settlement to be in good faith, we cannot treat the notice of appeal as a writ petition and review the determination on that basis. (Cf. *In re Marriage of Patscheck* (1986) 180 Cal.App.3d 800, 804 [“there is no authority for treating an untimely appeal as a writ petition”].) Accordingly, G & G is barred from challenging the good faith settlement determination under *Main Fiber Products*. We will therefore dismiss G & G’s appeal to the extent it seeks to challenge the validity of that determination.

C. *Summary judgment for McCarthy/Obayashi*

G & G's remaining contention is that the court erred in granting McCarthy/Obayashi's motion for summary judgment, based on its ruling that McCarthy/Obayashi and not G & G was entitled to the \$271,499 withheld by the County. We review a grant of summary judgment de novo. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67-68.)

1. *Double recovery*

G & G argues the court's ruling gave McCarthy/Obayashi a double recovery, because McCarthy/Obayashi already had recovered damages in the LASC action to compensate for the County's withholding of the \$271,499. Therefore, G & G asserts, McCarthy/Obayashi was not entitled to receive the withheld funds as well.

As G & G notes, Labor Code section 1729 in effect permits a prime contractor to pass through to its subcontractor a public entity's withholding of funds on account of the subcontractor's failure to pay the prevailing wage. Under section 1729, the prime contractor can either withhold funds from the subcontractor sufficient to cover the funds withheld by the public entity or recover that amount from the subcontractor if the funds have already been paid.³

³ Labor Code section 1729 provides: "It shall be lawful for any contractor to withhold from any subcontractor under him sufficient sums to cover any penalties withheld from him by the awarding body on account of the subcontractor's failure to comply with the terms of this chapter, and if payment has already been made to the subcontractor the contractor may recover from him the amount of the penalty or forfeiture in a suit at law."

The trial court found, however, that McCarthy/Obayashi did not exercise that right. The court based its finding on a declaration of Carter Chappell, an officer of one of the McCarthy/Obayashi joint venture partners, who had ultimate responsibility for the construction project. In the part of the declaration cited by the court, Mr. Chappell set forth the method by which McCarthy/Obayashi calculated its claim for damages on its cross-complaint in the LASC action.

According to Mr. Chappell, McCarthy/Obayashi computed its damages by determining the projected cost of completing the work G & G was supposed to have performed and subtracting the total amount McCarthy/Obayashi was to have paid G & G. Thus, G & G in effect received a credit for the amount it would have earned had it performed, including the \$271,499 in withheld funds.

Mr. Chappell further stated that McCarthy/Obayashi did not seek in the LASC action to recover damages to compensate for the \$271,499 withheld by the County, because it had not been determined at that time whether G & G in fact was liable for failure to pay the prevailing wage. Therefore, McCarthy/Obayashi sought damages only against G & G's performance bond. In the event G & G was found liable for not paying the prevailing wage, McCarthy/Obayashi would proceed against G & G's labor and material payment bond.⁴

⁴ A performance bond guarantees that a contractor or subcontractor will perform the contract. (1 Acret, Cal. Construction Contracts and Disputes (3d ed. 1999) § 3.142, p. 283.) A payment bond guarantees that a contractor or subcontractor will pay all persons who have claims against it, such as workers or material suppliers. (See Civ. Code, § 3096.)

The trial court concluded G & G had presented no evidence to contradict Mr. Chappell's statements. Our independent review of the record leads us to the same conclusion. McCarthy/Obayashi's cross-complaint in the LASC action asserted claims for breach of contract, enforcement of G & G's performance bond, and breach of the covenant of good faith and fair dealing implied in the performance bond. In its breach of contract claim, McCarthy/Obayashi alleged G & G failed to complete the work and performed some work incorrectly, causing McCarthy/Obayashi to have to engage a replacement contractor to complete the job and correct the deficiencies at additional cost.

In its claim for enforcement of the performance bond, McCarthy/Obayashi alleged that the surety on the bond breached the terms of the bond by failing to remedy G & G's default, complete the subcontract, obtain a replacement contractor, or pay the cost of completing the work. In its claim for breach of the covenant of good faith and fair dealing, McCarthy/Obayashi alleged that the surety failed to conduct a diligent investigation, deliberately delayed making a decision on McCarthy/Obayashi's claim against the bond, and unjustifiably refused to perform its obligations under the bond.

Nowhere in its cross-complaint did McCarthy/Obayashi allege that G & G had violated the prevailing wage law or that McCarthy/Obayashi had suffered any damage due to withholding of funds by the County. Nor did the cross-complaint seek compensation for any such violation or withholding. In fact, G & G in opposing McCarthy/Obayashi's motion for summary judgment conceded it was undisputed that McCarthy/Obayashi's cross-

complaint “does not allege damages for failure to remove liens or failure to pay prevailing wages to G & G labor force.”

Similarly, the jury’s verdict in favor of McCarthy/Obayashi did not purport to award damages based on G & G’s prevailing wage violation or the County’s withholding of funds. The verdict merely determined that G & G breached the subcontract and that the resulting damages to McCarthy/Obayashi were \$1,367,821. There was no further specification of the damages or any other indication that compensation for the prevailing wage law violation or the withholding was included in the recovery, either in the verdict or the ensuing judgment.

The remaining documents in the record similarly fail to indicate that McCarthy/Obayashi sought or recovered compensation for the prevailing wage violation or withholding in the LASC action. G & G offered a portion of the LASC trial transcript, in which counsel for McCarthy/Obayashi argued to the jury that the County had withheld funds from McCarthy/Obayashi due to G & G’s lack of performance. However, it is clear from the context of the argument that counsel was explaining why McCarthy/Obayashi had not paid G & G the full amount of the subcontract. Counsel stated:

“If you look at the exhibits, I think the payments were made as they were supposed to be made. And one other thing, Mr. Alban told us, from the County, as of today or last week, the County is still holding almost \$340,000 from McCarthy on account of stop notices, and with holds served in connection with G & G’s performance or lack of performance on the contract site.”

McCarthy/Obayashi admitted it *defended* G & G's complaint in the LASC action in part on the basis that G & G had breached the subcontract by failing to pay the prevailing wage and therefore was not entitled to recover on the subcontract. McCarthy/Obayashi denied only that it sought any *affirmative* relief on its cross-complaint based on the withholding of the \$271,499. Counsel's reference to the County's withholding of funds in the transcript excerpt offered by G & G was consistent with McCarthy/Obayashi's position.

G & G also offered excerpts of testimony in the LASC action from Dean Piles, construction director for McCarthy/Obayashi. Mr. Piles's testimony, however, contained nothing to indicate that McCarthy/Obayashi was claiming damages in the LASC action for G & G's violation of the prevailing wage law or for the withholding of funds by the County. To the contrary, he testified that McCarthy/Obayashi expected to "receive another \$250,000 once the issue of the withholding has been decided" Thus, his testimony indicated McCarthy/Obayashi would receive the withheld funds from the County at a later date, not from G & G on its cross-complaint in the LASC action.

On this record, the court properly determined there was no evidence rebutting McCarthy/Obayashi's showing that it did not seek or receive compensation for the withheld funds in the LASC action. Therefore, the court properly ruled that awarding those funds to McCarthy/Obayashi would not result in a double recovery. As we have concluded the trial court correctly found McCarthy/Obayashi did not pass through the withholding to G & G, we need not address G & G's argument that McCarthy/Obayashi could not rely on the doctrine of equitable subrogation as an additional ground for retaining the withheld funds.

2. *Res judicata*

G & G argued in the trial court that even if McCarthy/Obayashi did not litigate in the LASC action its claim to compensation for G & G's failure to pay prevailing wages, it could have done so. Therefore, G & G argued, McCarthy/Obayashi's attempt to assert that claim in the present action was barred by the aspect of res judicata prohibiting a party from splitting its cause of action. Assuming, though it is not clear from G & G's brief, that G & G makes the same contention here, we reject it.

In general, the doctrine of res judicata precludes a party from relitigating any part of a cause of action that has been finally determined in a previous action. A cause of action includes all claims arising from the same primary right, i.e., the same injury to the plaintiff and the same wrong by the defendant. Once a cause of action has been litigated, the judgment bars litigation of any claim that arises from that cause of action, so that it could have been raised in the prior case, whether or not it was actually raised. (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.)

It is established, however, that claims arising from the same contract are not necessarily part of the same cause of action. Rather, where the operative facts giving rise to each claim are different, in each instance a different primary right is involved. (*Symcox v. Zuk* (1963) 221 Cal.App.2d 383, 391.) Here, McCarthy/Obayashi's claim to the withheld funds was based on different operative facts — G & G's failure to pay the prevailing wage — than its damage claim in the LASC action — G & G's failure to complete the work properly.

Moreover, res judicata does not bar litigation of a claim even though it is part of a cause of action previously litigated where there are changed conditions and new facts which were not in existence at the time of the prior judgment. (*Neil Norman, Ltd. v. William Kasper & Co.* (1983) 149 Cal.App.3d 942, 947.) Mr. Chappell stated in his declaration, without contradiction, that at the time the LASC action was litigated it had not been determined whether G & G was liable for failure to pay the prevailing wage. After the judgment in the LASC action, however, a judgment was entered in favor of the DLSE in another action against G & G in San Joaquin County Superior Court. The San Joaquin action raised the same issue as to the proper classification of G & G's workers as was raised in this case.

The court in the San Joaquin action determined the classification was improper, and G & G was liable for the underpayment. McCarthy/Obayashi decided to settle the present case with the DLSE based on that determination. Thus, McCarthy/Obayashi's claim to the withheld funds was based on facts not in existence at the time of the LASC judgment. Res judicata therefore did not bar McCarthy/Obayashi's claim to the funds in the present case.⁵

⁵ In addition, a judgment is not considered final for res judicata purposes until an appeal from it has been exhausted or the time to appeal has expired. (*Franklin & Franklin v. 7-Eleven Owners for Fair Franchising* (2000) 85 Cal.App.4th 1168, 1174.) It appears the LASC judgment was on appeal when the judgment in this case was entered. However, as the parties have not argued the possible affect of the pendency of the appeal on the application of res judicata in this case, we do not address the issue.

III

DISPOSITION

The judgment is affirmed. The purported appeal from the good faith settlement determination is dismissed. Respondents shall recover costs on appeal.

NOT TO BE PUBLISHED

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

WARD
J.